

WEST VIRGINIA LEGISLATURE

2020 REGULAR SESSION

Introduced

Senate Bill 639

BY SENATOR TRUMP

[Introduced January 28, 2020; referred
to the Select Committee on Children and Families;
and then to the Committee on the Judiciary]

1 A BILL to amend and reenact §49-4-502 and §49-4-601 of the Code of West Virginia, 1931, as
 2 amended, all relating to the duties of the prosecuting attorney in child abuse and neglect
 3 matters; and providing for who may file a child abuse and neglect petition.

Be it enacted by the Legislature of West Virginia:

ARTICLE 4. COURT ACTIONS.

**§49-4-502. Prosecuting attorney to cooperate with ~~persons other than the department in~~
 child abuse and neglect matters; duties.**

1 ~~It is the duty of every~~ Every prosecuting attorney ~~to shall~~ cooperate fully and promptly with
 2 ~~persons seeking to apply for relief, including copetitioners with~~ the department, under this article
 3 in all cases of suspected child abuse and neglect; to promptly prepare applications and petitions
 4 for relief requested by ~~those persons~~ the department, to investigate reported cases of suspected
 5 child abuse and neglect for possible criminal activity; and to report at least annually to the grand
 6 jury regarding the discharge of his or her duties with respect thereto.

PART VI. PROCEDURES IN CASES OF CHILD NEGLECT OR ABUSE.

**§49-4-601. Petition to court when child believed neglected or abused; venue; notice; right
 to counsel; continuing legal education; findings; proceedings; procedure.**

1 (a) *Petitioner and venue.* -- If the department ~~or a reputable person~~ believes that a child is
 2 neglected or abused, the department ~~or the person~~ may present a petition setting forth the facts
 3 to the circuit court in the county in which the child resides, or ~~if the petition is being brought by the~~
 4 ~~department~~ in the county in which the custodial respondent or other named party abuser resides,
 5 or in which the abuse or neglect occurred, or to the judge of the court in vacation. Under no
 6 circumstance may a party file a petition in more than one county based on the same set of facts.

7 (b) *Contents of Petition.* -- The petition shall be verified by the oath of some credible person
 8 having knowledge of the facts. The petition shall allege specific conduct including time and place,
 9 how the conduct comes within the statutory definition of neglect or abuse with references thereto,

10 any supportive services provided by the department to remedy the alleged circumstances and the
11 relief sought.

12 (c) *Court action upon filing of petition.* -- Upon filing of the petition, the court shall set a
13 time and place for a hearing and shall appoint counsel for the child. When there is an order for
14 temporary custody pursuant to this article, the preliminary hearing shall be held within ten days of
15 the order continuing or transferring custody, unless a continuance for a reasonable time is granted
16 to a date certain, for good cause shown.

17 (d) *Department action upon filing of the petition.* -- At the time of the institution of any
18 proceeding under this article, the department shall provide supportive services in an effort to
19 remedy circumstances detrimental to a child.

20 (e) *Notice of hearing.* --

21 (1) The petition and notice of the hearing shall be served upon both parents and any other
22 custodian, giving to the parents or custodian at least five days' actual notice of a preliminary
23 hearing and at least ten days' notice of any other hearing.

24 (2) Notice shall be given to the department, any foster or preadoptive parent, and any
25 relative providing care for the child.

26 (3) In cases where personal service within West Virginia cannot be obtained after due
27 diligence upon any parent or other custodian, a copy of the petition and notice of the hearing shall
28 be mailed to the person by certified mail, addressee only, return receipt requested, to the last
29 known address of the person. If the person signs the certificate, service shall be complete and
30 the certificate shall be filed as proof of the service with the clerk of the circuit court.

31 (4) If service cannot be obtained by personal service or by certified mail, notice shall be
32 by publication as a Class II legal advertisement in compliance with §59-3-1 *et seq.* of this code.

33 (5) A notice of hearing shall specify the time and place of the hearing, the right to counsel
34 of the child and parents or other custodians at every stage of the proceedings and the fact that
35 the proceedings can result in the permanent termination of the parental rights.

36 (6) Failure to object to defects in the petition and notice may not be construed as a waiver.

37 (f) *Right to counsel.* --

38 (1) In any proceeding under this article, the child, his or her parents and his or her legally
39 established custodian or other persons standing in *loco parentis* to him or her has the right to be
40 represented by counsel at every stage of the proceedings and shall be informed by the court of
41 their right to be so represented and that if they cannot pay for the services of counsel, that counsel
42 will be appointed.

43 (2) Counsel shall be appointed in the initial order. For parents, legal guardians, and other
44 persons standing in *loco parentis*, the representation may only continue after the first appearance
45 if the parent or other persons standing in *loco parentis* cannot pay for the services of counsel.

46 (3) Counsel for other parties shall only be appointed upon request for appointment of
47 counsel. If the requesting parties have not retained counsel and cannot pay for the services of
48 counsel, the court shall, by order entered of record, appoint an attorney or attorneys to represent
49 the other party or parties and so inform the parties.

50 (4) Under no circumstances may the same attorney represent both the child and the other
51 party or parties, nor may the same attorney represent both parents or custodians. However, one
52 attorney may represent both parents or custodians where both parents or guardians consent to
53 this representation after the attorney fully discloses to the client the possible conflict and where
54 the attorney assures the court that she or he is able to represent each client without impairing her
55 or his professional judgment; however, if more than one child from a family is involved in the
56 proceeding, one attorney may represent all the children.

57 (5) A parent who is a copetitioner is entitled to his or her own attorney. The court may
58 allow to each attorney so appointed a fee in the same amount which appointed counsel can
59 receive in felony cases.

60 (g) *Continuing education for counsel.* -- Any attorney representing a party under this article
61 shall receive a minimum of eight hours of continuing legal education training per reporting period

62 on child abuse and neglect procedure and practice. In addition to this requirement, any attorney
63 appointed to represent a child must first complete training on representation of children that is
64 approved by the administrative office of the Supreme Court of Appeals. The Supreme Court of
65 Appeals shall develop procedures for approval and certification of training required under this
66 section. Where no attorney has completed the training required by this subsection, the court shall
67 appoint a competent attorney with demonstrated knowledge of child welfare law to represent the
68 parent or child. Any attorney appointed pursuant to this section shall perform all duties required
69 of an attorney licensed to practice law in the State of West Virginia.

70 (h) *Right to be heard.* -- In any proceeding pursuant to this article, the party or parties
71 having custodial or other parental rights or responsibilities to the child shall be afforded a
72 meaningful opportunity to be heard, including the opportunity to testify and to present and cross-
73 examine witnesses. Foster parents, preadoptive parents, and relative caregivers shall also have
74 a meaningful opportunity to be heard.

75 (i) *Findings of the court.* -- Where relevant, the court shall consider the efforts of the
76 department to remedy the alleged circumstances. At the conclusion of the adjudicatory hearing,
77 the court shall make a determination based upon the evidence and shall make findings of fact
78 and conclusions of law as to whether the child is abused or neglected and whether the respondent
79 is abusing, neglecting, or, if applicable, a battered parent, all of which shall be incorporated into
80 the order of the court. The findings must be based upon conditions existing at the time of the filing
81 of the petition and proven by clear and convincing evidence.

82 (j) *Priority of proceedings.* -- Any petition filed and any proceeding held under this article
83 shall, to the extent practicable, be given priority over any other civil action before the court, except
84 proceedings under §48-27-309 of this code and actions in which trial is in progress. Any petition
85 filed under this article shall be docketed immediately upon filing. Any hearing to be held at the
86 end of an improvement period and any other hearing to be held during any proceedings under
87 this article shall be held as nearly as practicable on successive days and, with respect to the

88 hearing to be held at the end of an improvement period, shall be held as close in time as possible
89 after the end of the improvement period and shall be held within 30 days of the termination of the
90 improvement period.

91 (k) *Procedural safeguards.* -- The petition may not be taken as confessed. A transcript or
92 recording shall be made of all proceedings unless waived by all parties to the proceeding. The
93 rules of evidence shall apply. Following the court's determination, it shall be inquired of the parents
94 or custodians whether or not appeal is desired and the response transcribed. A negative response
95 may not be construed as a waiver. The evidence shall be transcribed and made available to the
96 parties or their counsel as soon as practicable, if the same is required for purposes of further
97 proceedings. If an indigent person intends to pursue further proceedings, the court reporter shall
98 furnish a transcript of the hearing without cost to the indigent person if an affidavit is filed stating
99 that he or she cannot pay therefor.

NOTE: The purpose of this bill is to eliminate the conflict of interest of the prosecuting attorney representing both the Department of Health and Human Resources and other individuals who file a petition in child abuse and neglect matters. The bill also clarifies who may file a child abuse and neglect petition.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.